NO. 47017-9-II

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**COURT OF APPEALS, DIVISION II**
**STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

JAMES CROCKETT, APPELLANT

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Appeal from the Superior Court of Pierce County
The Honorable John R. Hickman

No. 13-1-04758-8

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# Brief of Respondent

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## B. STATEMENT OF THE CASE.

### 1. Procedure

In December 2013, the State charged James Crockett (hereinafter "Defendant") with four counts of second degree child rape, all alleged to be domestic violence incidents occurring between August 1, 2008, and November 30, 2008. CP 1–3; RCW 9A.44.076, RCW 10.99.020. After the State rested its case-in-chief, the defense called two witnesses, the State called a rebuttal witness, and the defense called a rebuttal witness. 10RP 771; 10RP 867; 11RP 895; 11RP 916.[1]

The jury found Defendant guilty as charged. CP 127–134. The court sentenced Defendant to a standard range sentence of 210 months to life. CP 150.

Defendant filed timely notice of appeal. CP 163.

### 2. Facts

M.W. was 12 years old[2] when her mother, Rhonda Crockett, married Defendant and he moved into their family home. 8RP 343.

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[1] The consecutively paginated verbatim report of proceedings will be referred to by the volume number, RP, and page number (#RP #).
[2] M.W.'s date of birth is December 31, 1995. 8RP 332.

Shortly after Defendant moved in, he began to touch M.W. inappropriately. 8RP 343–344. M.W. described the abuse: "First he was just rubbing my back, and then he put his shirt – or his hand under my shirt and was rubbing my shoulder and then went to my breast." 8RP 346. Defendant continued touching M.W.'s breasts, then he started to touch her vagina. 8 RP 348. At first, Defendant touched M.W. over her clothes, then he went inside her pants and underwear and inserted his fingers into her vagina. 8RP 348. M.W. estimated that Defendant did this fifteen to twenty times. 8RP 349–350. Each time, the abuse lasted ten to thirty minutes. 8RP 350.

After one instance of Defendant inserting his fingers into M.W.'s vagina, he told M.W. "not to tell anyone because he would get in trouble and that he was just like wanting to be married to [M.W.'s] mom or he like was good for her and wanted to provide for her." 8RP 350. M.W. would sometimes try to push Defendant away during the attacks. 8RP 350.

Defendant also touched M.W. in the car on the way home from church. 8RP 352. Defendant had M.W. sit in the front seat next to him, he would lift her skirt, and he would touch her vagina over her underwear while he drove. 8RP 353. M.W.'s younger sister, L.C., was in the back seat. 8RP 353.

On Thanksgiving Day of 2008, M.W. disclosed the abuse to her mother. 8RP 355–356. Her mother confronted Defendant and he initially denied touching M.W., but then Defendant fearfully admitted he had

touched M.W. 8RP 358. Rhonda Crockett decided to not call the police, and Defendant did not leave the home. 8RP 358. According to Rhonda Crockett, Defendant admitted to touching M.W. that day but not "in a sexual way." 9RP 533. Rhonda Crockett testified that, after the disclosure, she put in safety measures to insure her daughters were not home alone with Defendant, and she asked M.W. many times afterwards if Defendant was touching her inappropriately. 9RP 541.

Years later in August 2013, Rhonda Crockett and M.W. got into a fight over M.W. driving Rhonda Crockett to an appointment. 8RP 364. Rhonda Crockett hit M.W., punched M.W., grabbed M.W.'s hair, and pulled M.W. to the ground by her ponytail. 8RP 365. M.W. expressed her frustration on Facebook a few days later saying, "Just that I was tired of having to live in the same house and remember and see that my – like the man – because my mom's husband raped me, and something about my mom breaking my neck. And then at the end of it, I just posted 'I'm a dead girl walking.'" 8RP 362. Police arrived at the Crockett house after a concerned person saw the Facebook post and notified police. 8RP 363; 8RP 546.

Officers Puccio and Chell arrived to check on the welfare of M.W. 8RP 456–457. Defendant answered the door, Puccio spoke to M.W. outside while Chell spoke to Defendant inside. 8RP 457.

M.W. shook and cried while begging Puccio to get her out of the house, telling him she was concerned about physical violence if she

stayed. 8RP 458. Puccio called Child Protective Services (CPS) after M.W. disclosed the sexual abuse and her feelings of danger in the house. 8RP 462. The officers took M.W. back to the police station for the night and then to a residential center for youth. 8RP 363. M.W. has not since been home. 8RP 363.

Mara Campbell was the CPS agent assigned to M.W.'s case. 9RP 660. Campbell and Detective Cynthia Brooks went to the group home where M.W. was staying to interview her. 9RP 662. M.W. disclosed to Campbell and Brooks that Defendant touched her breasts and penetrated her vagina with his fingers ten to twenty times. 9RP 665–668; 10RP 728. M.W. also disclosed an incident where Defendant rubbed M.W.'s foot on his bare penis while they sat on the couch. 9RP 665; 10RP 731.

L.C. and Defendant testified in the defense case-in-chief. *See* 10RP 781, 800. L.C. testified that Rhonda Crockett was not always home when L.C. and M.W. were home with Defendant. 10RP 189. L.C. never saw Defendant inappropriately touch M.W. in the living room or the car. 10RP 791–92.

Defendant claimed that he at one point had a conversation with M.W. and L.C. about how to react if someone were to try to touch them inappropriately to best protect themselves. 10RP 825. In this conversation, Defendant "accidentally" made contact with M.W.'s leg and then her

stomach. 10RP 828. This was the touching Defendant claimed that he was admitting to on Thanksgiving Day of 2008 when M.W. disclosed to her mother. 10RP 835.

C. ARGUMENT.

1. BECAUSE DEFENDANT FAILED TO OBJECT AT TRIAL TO THE INTRODUCTION OF M.W.'S PRIOR CONSISTENT STATEMENTS, THE ISSUE WAS WAIVED FOR APPEAL.

The first issue to address when reviewing evidentiary issues on appeal is whether those issues have been properly preserved for appeal. ***State v. Powell***, 126 Wn.2d 244, 256, 893 P.2d 615 (1995). A party must specifically object to evidence presented at trial to preserve the matter for appellate review. RAP 2.5(a); ***State v. Perez-Cervantes***, 141 Wn.2d 468, 482, 6 P.3d 1160 (2000); ***State v. Stein***, 140 Wn. App. 43, 68, 165 P.3d 16 (2007). Because Defendant failed to object to the challenged evidence at trial, he failed to properly preserve the matter for appeal, and the evidentiary issue is waived.

At trial, the State alerted defense counsel to its plan to introduce the prior consistent statements of M.W. 9RP 488. The State said, "Based on some of the questions [defense counsel] asked during cross-examination, it's the State's belief that under Rule 801(d)(1), the State would be able to ask Mara Campbell, who's the CPS worker, and Detective Brooks questions regarding [M.W.'s] prior consistent

statements." 9RP 488. The State then read the rule aloud. 9RP 488; ER 801(d)(1)(ii). In response, the following dialogue with the court occurred:

> [COURT]: All right. I just want you to drill down as to what prior – what statements you believe that were asked of her that she was impeached on.
> [STATE]: Okay. Well, in general and as the rule explains . . . .
> [COURT]: I don't disagree that, *in theory*, you have the right to do it. I just want to know what consistent statements you plan on --
> [STATE]: Oh, okay.
> [COURT]: -- using by whatever witness. And you don't have to do this now, but I do want to know . . . .
> [STATE]: It's the touching; it's the sexual touching.
> . . . .
> [COURT]: All right. Well, *I'll wait until [defense counsel] has an opportunity to respond* and have [sic] a chance to look at it, but *I'm not going to make any ruling on it now.*

9RP 491–93 (emphasis added).[3] Defense counsel did not object—or say anything substantive—at this time. *See* 9RP 488–93.

Then, during Mara Campbell's testimony, before the State began to elicit M.W.'s prior consistent statements, the following exchange occurred:

> [STATE]: And, Your Honor, I don't know if we need to address that issues that was discussed earlier outside the presence of the jury.

[3] This dialogue does not support the conclusion that the trial court "agreed" with the State's analysis or "admitted" the statements. Rather, the court said that "in theory" the State may have the right to admit the evidence, and the court explicitly said it was not making a ruling at that time. Compare to Br. of App. p. 18.

> [COURT]: Counsel, do you wish to have a hearing or – outside the presence of the jury in regards to that issue, or do you wish to proceed?
> [DEFENSE]: Let's proceed.

9RP 663.

Thus, both the State and the court gave Defendant the opportunity to object or be heard on the issue, and Defendant explicitly rejected the opportunity. 9RP 663. Defendant did not raise any objection to Campbell's subsequent testimony. *See* 9RP 663–678. Defendant then extensively cross-examined Campbell on the statements M.W. made to her. *See* 9RP 678–693.

Defendant did raise one hearsay objection during Detective Brooks' testimony:

> [STATE]: Do you recall if she ever said anything that he said explaining to her explaining why – what he was doing?
> [BROOKS]: I may have to refresh my memory, but I believe at one point he told her --
> [DEFENSE]: Objection, hearsay.
> [COURT]: Counsel, what was the objection?
> [DEFENSE]: Hearsay.
> [STATE]: Prior consistent statement, Your Honor.
> [COURT]: I'll allow it. You may answer the question.
> [BROOKS]: Okay. That he told her he wanted – that he did those things or wanted to see how she was going to react when she was with older boys.

10RP 729–30. Brooks, however, had already been testifying at length about the prior consistent statements of M.W. 10RP 726–729. Brooks then continued to testify without objection to more of M.W.'s prior consistent statements. 10RP 730–735. Defendant then extensively cross-examined

Brooks on the statements made by M.W. *See* 10RP 735–56. This statement is also not identified—nor is any other specific statement—by Defendant in his argument against the overall testimony of Campbell and Brooks. *See* Br. of App. p. 18–22.

Therefore, this one objection to one of the many statements now alleged to be improper cannot be sufficient to preserve the issue for appeal. *See, e.g.*, ***Perez-Cervantez***, 141 Wn.2d at 482–83 (declining to find the trial court abused its discretion in admitting alleged hearsay evidence, in part, because the defendant failed to object and failed to specify which aspects of the testimony were hearsay); ***State v. Guloy***, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985) ("A party may only assign error in the appellate court on the specific ground of the evidentiary objection made at trial.").

Objections are required "to afford the trial court an opportunity to correct any error, thereby avoiding unnecessary appeals and retrials." ***State v. Avendano-Lopez***, 79 Wn. App. 706. 710, 904 P.2d 324 (1995) (quoting ***Smith v. Shannon***, 100 Wn.2d 26, 37, 666 P.2d 351 (1983)). Considerations of fairness also support raising objections at trial so that the opposing party has the opportunity at trial to respond and shape their cases accordingly, rather than facing newly-asserted error for the first time on appeal. ***Avendano-Lopez***, 79 Wn. App. at 710. Defendant failed to object to the evidence he now contends was inadmissible. Defendant

should not be afforded the opportunity to raise this unpreserved evidentiary claim for the first time on appeal.

2. DEFENDANT FAILED TO MEET THE BURDEN OF SHOWING PROSECUTORIAL MISCONDUCT BY FAILING TO SHOW EITHER FLAGRANT AND ILL INTENTIONED MISCONDUCT OR THE REQUISITE PREJUDICE FOR ANY OF HIS MISCONDUCT CLAIMS.

In a prosecutorial misconduct claim, the defendant bears the burden of proving the conduct was both improper and prejudicial. ***State v. Emery***, 174 Wn.2d 741, 756, 278 P.3d 653 (2012). Failure to object to an improper remark is a waiver of error unless the remark is "so flagrant and ill intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." ***State v. Russell***, 125 Wn.2d 24, 86, 882 P.2d 747 (1994). Objections are required both to prevent further improper remarks and to prevent potential abuse of the appellate process. ***Emery***, 174 Wn.2d at 762.

The focus of a reviewing court should be less on whether the misconduct was flagrant or ill intentioned and more on whether the resulting prejudice could have been cured. ***Emery***, 174 Wn.2d at 762. When reviewing a claim that a prosecutor's statement requires reversal, the court should review the statements in the context of the entire case. ***State v. Thorgerson***, 172 Wn.2d 438, 443, 258 P.3d 43 (2011) (citing ***Russell***, 125 Wn.2d at 86). Where the defendant claims prosecutorial misconduct,

he bears the burden of establishing the impropriety of the prosecutor's comments as well as their prejudicial effect. ***State v. Anderson***, 153 Wn. App. 417, 427, 220 P.3d 1273 (1009) (citing ***State v. Brown***, 132 Wn.2d 529, 561, 940 P.2d 546 (1997)).

a. The prosecutor did not commit flagrant and ill intentioned misconduct because he did no more than lay the foundation for impeachment by contradiction, and Defendant can show no prejudice from these alleged errors.

Asking one witness whether another witness is lying "is contrary to the duty of prosecutors, which is to seek convictions based only on probative evidence and sound reason." ***State v. Vassar***, __ Wn. App. __, 352 P.3d 856, 860 (2015) (quoting ***State v. Casteneda-Perez***, 61 Wn. App. 354, 363, 810 P.2d 74 (1991)). It is improper to conduct cross-examination "designed to compel a witness to express an opinion as to whether other witnesses were lying." ***Vassar***, 352 P.3d at 860 (quoting ***State v. Padilla***, 69 Wn. App. 295, 299, 846 P.2d 564 (1993)).

The first questioning of Rhonda Crockett that Defendant contends was improper occurred during the State's direct[4] examination. While inquiring about the interview Rhonda Crockett had with Campbell and Brooks, the prosecutor asked:

[4] Before Rhonda Crockett testified, the parties discussed that although Rhonda Crockett was called in the State's case-in-chief, she was also going to be called in the defense's case. 9RP 493. Therefore, the court said, for judicial economy reasons, the defense could use Rhonda Crockett as their witness simultaneous to her testifying in the State's case-in-chief. 9RP 493–94. Rhonda Crockett was not subsequently called in the defense's case-in-chief, although she was called again as a defense rebuttal witness. *See* 11RP 916.

> [STATE]: Now, do you recall telling Detective Brooks that the defendant admitted to his son that he touched [M.W.]?
> [RHONDA CROCKETT]: No. I don't recall that he touched her sexually, admitted that he touched her sexually. I don't recall admitting that.
> [STATE]: Now, you're inserting the word "sexually"?
> [RHONDA CROCKETT]: Yes
> [STATE]: But do you recall telling Detective Brooks that he admitted to touching her? I'm not inserting the word "sexually." That he admitting [sic] to touching her and that he notified his son about this?
> [RHONDA CROCKETT]: You know, the way the information was reported was not the way I shared that story with them. So --
> [STATE]: So my question to you is: Didn't you tell Detective Brooks that he admitted to his son and admitted to you that he had touched her, yes or no?
> [RHONDA CROCKETT]: No. I didn't --
> [STATE]: And so if Detective Brooks were to state that you said that to her, would she be incorrect?
> [RHONDA CROCKETT]: I don't know because I'm not Detective Brooks.
> [STATE]: And if Mara Campbell was to state that, would she also be wrong?
> [RHONDA CROCKETT]: I don't know, because I'm not her either.

9RP 535–36. Defendant raised no objection to this line of questioning. *See* 9RP 535–36.

The second part of the State's direct examination of Rhonda Crockett to which Defendant assigns error occurred as follows:

> [STATE]: Now, at one point did [M.W.] run away in 2000 – would have been 2013?
> [RHONDA CROCKETT]: 2012.
> [STATE]: 2012, she ran away. And did she tell you the reason why she ran away?
> [RHONDA CROCKETT]: Yes. She did tell me the reason why she ran away.

> [STATE]: What was the reason that she told you?
> [RHONDA CROCKETT]: She told me that she wanted to be my friend, she wanted me to be her friend, and she felt like we weren't connected because we weren't friends.
> [STATE]: Didn't you tell Mara Campbell that the reason [M.W.] ran away was because what – of what the defendant had done to her?
> [RHONDA CROCKETT]: No, I did not tell Mara Campbell that. I gave a letter that [M.W.] had written to Mara Campbell.
> [STATE]: Okay. So, if Mara Campbell were to state that you told her that, would she be incorrect?
> [RHONDA CROCKETT]: I'm not going to make that conclusion.

9RP 541–42. Defendant raised no objection to this line of questioning. *See* 9RP 541–42.

Defendant further assigns error to the prosecutor's cross-examination of Defendant. In his questioning about the statements Defendant gave to the officers who came to Defendant's home, the prosecutor asked:

> [STATE]: And you spoke to the officer inside the house?
> [DEFENDANT]: Yes, sir.
> [STATE]: And you testified that you demonstrated to that officer how you touched her?
> [DEFENDANT]: Yes, sir.
> [STATE]: Now, isn't it true that you told Officer Chell that the touching that occurred in 2008 was related to you accidentally brushing your hand against her while moving items out of the home that you were moving out of?
> [DEFENDANT]: No, sir. I don't remember telling him that.
> [STATE]: So your testimony is that you did not tell Officer Chell that?
> [DEFENDANT]: My testimony is, sir, I don't remember saying that to him.
> . . . .

> [STATE]: So if Officer Chell testified to that, would he be incorrect?
> [DEFENDANT]: I don't know. I don't know what he – what I might had [sic] said at that time, how he received it in his ear, but at this present time on this present day, I don't remember repeating that to him. I repeated – I remember repeating to him and demonstrating to him what I did when I was showing [M.W.] and [L.C.] how to protect themselves. So I couldn't say he lied or not.

10RP 864–66. Defendant raised no objection to this questioning. *See* 10RP 864–66.

The "liar question" misconduct cases are factually distinguishable from the present case. For example, in ***Padilla***, the questioning found improper was:

> Q: *So your testimony today is that Officer Murry didn't tell the truth?*
> A: Yes. I think he didn't tell the truth.
> Q: *Why would he lie?*
> A: I don't know.
> Q: You have no idea?
> A: I have no idea.

***Padilla***, 69 Wn. App. at 299 (emphasis in original). These questions directly ask about whether the other witness was *lying.* Another case, ***Casteneda-Perez*** also involved explicit "liar" questioning. The prosecutor's questions, in part, in that case included: "you would say that she's *lying*;" "what you are telling this jury is that . . . Officer Barnett was *telling a lie* when she testified to that;" and "[s]o the officer is *lying* when she testifies that." ***Casteneda-Perez***, 61 Wn. App. at 357–59 (emphasis added).

In the present case, the prosecutor did not use explicit "liar" questions like the ones found improper in ***Padilla*** and ***Casteneda-Perez***. The prosecutor did not ask Rhonda Crockett whether the other witnesses were lying; the prosecutor asked if Rhonda Crockett believed those statements to be "incorrect." Further, the questions were in the form of a hypothetical. The prosecutor asked, for example, "So *if* Officer Chell testified to that, would he be incorrect?" 10RP 866 (emphasis added). In this questioning, the prosecutor was establishing a foundation to impeach these witnesses by contradiction,[5] because their testimony was inconsistent with that anticipated from the other witnesses.[6] It was not flagrant and ill intentioned misconduct for the prosecutor to give Rhonda Crockett and Defendant an opportunity to explain their inconsistent testimony before calling other witnesses to rebut that inconsistent testimony.

Defendant has further failed to prove the requisite prejudice for this claim of prosecutorial misconduct. "Liar questions" on cross-examination are harmless unless so egregious as to be incapable of cure by an objection and an appropriate jury instruction. ***Vassar***, 352 P.3d at 860.

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[5] Tegland explains, "the practice loosely referred to as 'impeachment by contradiction' is actually the process of offering substantive evidence to rebut the opponent's evidence." 5D Tegland, Wash. Prac. Series, *Courtroom Handbook on Evidence* § 607:10 at 267 (2014–2015).

[6] Defendant argues that the order of the witnesses demonstrates that the "improper questions were ill-intentioned." Br. of App. p. 28. It, however, does not seem the State would be required to call witnesses to impeach other witnesses by contradiction *before* those witnesses gave their contradictory testimony. In fact, the rules of evidence may preclude the State from doing so.

Some factors courts consider in determining prejudice in these types of misconduct allegations are: whether the prosecutor actually provoked the defense witness to say the State's witness must be lying, whether the State's witness' testimony was believable or corroborated, and whether the defense witness' testimony was believable or corroborated. ***Padilla***, 69 Wn. App. at 301. For example, in ***Casteneda-Perez***, the court found that, despite extensive questioning where the prosecutor directly asked the witness several times if another witness was *lying*, there was no prejudice in part because it was "very seldom" that the prosecutor was able to get the witness to say that the police officer witness was lying. 61 Wn. App. at 364. Additionally, the police officer testimony was corroborated and believable. *Id.*

In the present case, the prosecutor, through the questioning Defendant alleges was improper, did not get the witnesses to say that the other witnesses were lying. As detailed above, both Rhonda Crockett and Defendant would not agree to the prosecutor's statements that the other witnesses were incorrect. Rather, both said things such as "I don't know," "I am not going to make that conclusion," and "I don't remember telling him that." *See, e.g.*, 9RP 535–36, 541–42, 10RP 864–66. The only time the term "lied" was used was when Defendant stated, "So I couldn't say he lied or not." 10RP 866. Thus, the prosecutor did not get the witness to say another witness was lying. Therefore, as in ***Casteneda-Perez***, Defendant has failed to show he was prejudiced by this questioning.

Further, it should be noted that Defendant was the first to employ the cross-examination tactic he now alleges was improper. In his cross-examination of M.W., Defendant asked:

> [DEFENSE]: So did Officer Puccio ask you, did [Defendant] ever expose himself to you?
> [M.W.]: I don't remember being asked that question.
> [DEFENSE]: You don't remember being asked that by the police?
> [M.W.]: No.
> [DEFENSE]: If the police said that --
> [STATE]: Objection, Your Honor, as to what another witness may or may not say to this witness.
> [COURT]: If he uses it as a hypothetical, I will allow it.
> [DEFENSE]: If the police had asked you that and you told them, no, he hadn't, then that would be true, wouldn't it?
> . . . .
> [DEFENSE]: . . . . If they had asked you that and you said no, would that have been true?
> [M.W.]: No.
> [DEFENSE]: That wouldn't have been true?
> [M.W.]: No.

8RP 404–05. The only difference between Defendant's questions and the questions of the prosecutor he now alleges were improper is that Defendant explicitly asked if the other witnesses were telling the truth, rather than if the other witnesses were simply incorrect.

Defendant has failed to show that the prosecutor committed flagrant and ill intentioned misconduct by pointing out the inconsistency of the witness's testimony. Defendant has further failed to prove the requisite prejudice because the witnesses refused to say whether the other

witnesses were lying and Defendant himself first used this tactic in cross-examination.

b. The prosecutor did not commit flagrant and ill-intentioned misconduct when he highlighted the inconsistency of Defendant's testimony and directly responded to the defense closing argument, and Defendant has failed to show the requisite prejudice because the jury was properly instructed.

In the middle of his closing argument while describing Defendant's testimony, the prosecutor discussed Defendant's inconsistent statements regarding how involved he was in raising M.W. and L.C. 11RP 961–62. In that argument, the prosecutor made the following remark:

> When [Defendant] was talking about his work with Vietnam veterans, one thing stood out for me. And I don't know if you caught it, but he said I work with Vietnam veterans, especially if they have children. I wrote that down in my notes, and I don't know if you captured that, but I thought that was something to consider.

11RP 962. Defendant did not object to this statement. *See* 11RP 962. After this remark, the prosecutor continued arguing about the inconsistent testimony given about Defendant's involvement in child-rearing. 11RP 962.

Due to his failure to object, Defendant must prove this comment was flagrant and ill-intentioned misconduct. Defendant on appeal contends, "The prosecutor used this innocuous statement to inflame the jury into believing that if they acquitted [Defendant], they would be sending an alleged child molester back onto the streets to have

unrestrained contact with homeless children of veterans." Br. of App. p. 25. The prosecutor's comment, however, could also be seen as an example of Defendant's overall involvement with children, to rebut—or highlight the inconsistencies of—the claims that he was not in any way involved in the child-rearing of M.W. and L.C. The statement now alleged to be improper, viewed in context of the overall argument, was made in the middle of the prosecutor's argument regarding these inconsistencies. Considering that Defendant did not see the need to object to the remark at trial, this explanation for the prosecutor's motivation behind making the remark is just as plausible as Defendant's theory on appeal. Defendant has failed to show how this remark exploring the inconsistency in Defendant's testimony was flagrant and ill-intentioned misconduct.

In support of his argument on appeal that this remark requires reversal, Defendant cites generally ***In re Glassman***, 175 Wn.2d 696, 286 P.3d 683 (2012). ***In re Glassman***, however, is distinguishable from the case at hand. In that case, the jury was presented a multi-media presentation with over 50 slides that the Court concluded were "full of imagery that likely inflamed the jury." *Id.* at 709. The Court focused on how the *imagery* presented a danger of improperly inflaming the jury. *Id.* The off-hand oral remarks in the present case do not present the same imagery concerns as the 50-plus slide multi-media presentation from ***In re Glassman***. Further, the Court in ***In re Glassman*** found that when *viewed as a whole* with the other instances of prosecutorial misconduct in that

case, the imagery required reversal. *Id.* at 710. The Court did not state that the imagery *alone* was flagrant and ill-intentioned misconduct. *Id.* at 709–10. Therefore, Defendant's reliance on ***In re Glassman*** is misplaced.

Defendant further contends a remark the prosecutor made during rebuttal improperly appealed to the passions of the jury.

Remarks of a prosecutor, even if improper, do not warrant reversal if they were invited by defense counsel and are in reply to his statements, unless the remarks are not a pertinent reply or are sufficiently prejudicial that a curative instruction would be ineffective. ***Russell***, 125 Wn.2d at 86 (citing ***State v. Dennison***, 72 Wn.2d 842, 849, 435 P.2d 526 (1967)); ***State v. Dykstra***, 127 Wn. App. 1, 8, 110 P.3d 758 (2005).

In the present case, Defendant now contends the prosecutor's rebuttal closing argument was improper. Br. of App. p. 25. It was not. It was in direct response to defense counsel's closing argument.

After telling a story about an English courthouse he visited where the wall read "In this hallowed place of justice, the crown never loses," 11RP 985, defense counsel made extensive argument about getting "justice" for Defendant. For example, defense counsel said, "with this evidence to convict him on this would be *unjust*." 11RP 986 (emphasis added). Then, "And so that's why, ladies and gentlemen, I'm asking you *in the name of justice*, in the name of *equal justice* under the laws of our state, to find [Defendant] not guilty." 11RP 986. The theme of the final part of defense counsel's closing argument was justice for Defendant.

In the State's rebuttal, the prosecutor began by arguing, "It's not just the defendant that was affected by this case. It was someone else, [M.W.], and justice for her, justice delayed for approximately six years." 11RP 988. This argument was in response to defense counsel's extensive closing argument urging the jury to "get justice" for Defendant.

Defendant did not object to the prosecutor's statement. *See* 11RP 988. Because this argument was in direct response to defense counsel's extensive calls for justice for Defendant, Defendant cannot prove it was flagrant and ill-intentioned misconduct.

Nor can Defendant show the requisite prejudice for either instance of alleged misconduct by inflaming the passions of the jury because the jury was properly instructed on its role.

The jury was instructed that the lawyers' remarks, statements, and arguments were not evidence or law, and that the jury was to disregard any argument not supported by the evidence or law. CP 169. Further, the jury was instructed:

> As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, prejudice, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

CP 170. The trial judge read these instructions to the jury at the start of trial. 7RP 254–56. The trial judge read these instructions again to the

jury—and the jury got the written packet of instructions—right before closing arguments. 11RP 928. The jury is presumed to follow the court's instructions. ***Emery***, 174 Wn.2d at 766. Defendant has failed to show he was actually prejudiced by the alleged misconduct because the jury was instructed to act impartially, not rely on prejudice, and to decide the case only on the evidence presented and the law given.

3. THE ISSUE OF WHETHER CHELL WAS A PROPER IMPEACHMENT WITNESS WAS NOT PROPERLY PRESERVED FOR APPEAL AND THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DISALLOWING AND LIMITING THE ATTEMPTED IMPEACHMENT OF CHELL.

a. Defendant did not object to the admissibility of impeachment testimony offered in the State's rebuttal through Officer Chell's testimony and therefore waived the issue on appeal.

A prosecutor is entitled to impeach a defendant's testimony. ***State v. Thompson***, 169 Wn. App. 436, 485, 290 P.3d 996 (2012).[7] The State called Officer Eric Chell in rebuttal to impeach Defendant's testimony relating to statements Defendant made and did not make to Chell. The prosecutor explained, "[Defendant] denied making that statement, and so proper rebuttal evidence would be for me to call Officer Chell to testify as to the statement that the defendant made to him that day." 11RP 893.

[7] Defendant's reliance on ***State v. Allen S.***, 98 Wn. App. 452, 989 P.2d 1222 (1999), Br. of App. p. 29, is misplaced. As the court in ***Thompson*** explained, ***Allen S.*** involved the impeachment of a jailhouse informant, not the defendant. ***Thompson***, 169 Wn. App. at 485. Therefore, ***Allen S.*** is not applicable to this claim. *See id.*

Defendant raised no objection. The prosecutor further stated, "And I'm prepared to ask Officer Chell whether or not he made any opinions to anyone about the case, and he'll give his answer to the Court or to the jury." 11RP 893. Defendant again raised no objection. *See* 11RP 893. During Chell's testimony, when the prosecutor asked about the statements Defendant made and about whether the officer offered any opinions to anyone about the case, defendant raised no objection. *See* 11RP 895–902.

A party must specifically object to evidence presented at trial to preserve the matter for appellate review. RAP 2.5(a); ***Perez-Cervantes***, 141 Wn.2d at 482; ***Stein***, 140 Wn. App. at 68. Defendant failed to object at any point to the impeachment testimony offered by the State, and his failure to object waived the issue for appeal.

b. The trial court did not abuse its discretion by limiting the permissible impeachment of Officer Chell to relevant and admissible testimony.

A trial court's decision to admit or exclude evidence—including impeachment evidence—is reviewed for an abuse of discretion. ***State v. Garland***, 168 Wn. App. 869, 875, 282 P.3d 1137 (2012) (citing ***State v. Magers***, 164 Wn.2d 174, 181, 189 P.3d 126 (2008)). An abuse of discretion will only be found when the trial court based its decision on untenable grounds. ***State ex. Rel. Carroll v. Junker***, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

The trial court in the present case did not abuse its discretion by not allowing Defendant to impeach Officer Chell with irrelevant testimony that had nearly been grounds for a mistrial previously.[8]

After the State's rebuttal, the defense called Rhonda Crockett in subrebuttal. 11RP 916. The defense sought to have Rhonda Crockett impeach Officer Chell's statements. 11RP 920. After hearing argument, the court permitted Rhonda Crockett to testify about the statements Defendant made to Officer Chell, but not about any alleged opinion Chell expressed on Defendant's guilt. 11RP 921.

Officer Chell's statement that Defendant sought to impeach with Rhonda Crockett's testimony was:

> [STATE]: At any time did you offer any opinions to anyone about this case?
> [CHELL]: No.

11RP 902.[9] After Defendant attempted to argue the basis for impeaching Chell through Rhonda Crockett's testimony, the court rejected the argument:

> [COURT]: I'm not going to allow something that I initially indicated that could have been grounds for a mistrial to now

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[8] During his direct-examination, Defendant said, "Then after, next, the one inside policeman, he was writing his report and everything. And I asked him – and he walked around, and he made this quotation that I don't believe what she's saying. I don't –" 10RP 846. The State objected, the judge sustained the objection, instructed the jury to disregard the statement, and struck it from the record. 10RP 846. The court then explained to Defendant—outside the presence of the jury—that if he continued to vocalize the opinions of others as to the ultimate issue of his guilt, the court may be forced to call a mistrial. 10RP 846.

[9] Although Defendant now contends this statement was "arguably irrelevant," Br. of App. p. 30, he did not raise any objection to this statement at trial.

> be repeated again by another witness, and I don't believe the questions that were carefully crafted by the State in any way opened the door to allow now that same testimony . . . . I don't think the door was opened to now say I can now express an opinion as to what the officer said as to guilt or innocence.

11RP 923. This decision to limit the permissible impeachment of Chell was not an abuse of discretion.

It is well settled that neither party may impeach a witness on a collateral issue—facts not directly relevant to the trial issue. ***State v. Aguirre***, 168 Wn.2d 350, 362, 229 P.3d 669 (2010). Relatedly, evidence offered to impeach is only relevant if it casts doubt on the credibility of the person being impeached, and the credibility of that person is a fact of consequence to the action. ***Allen S.***, 98 Wn. App. at 459–60. Defendant himself says, "Whether the jury would have believed Officer Chell or Ms. Crockett on this point is *irrelevant*." Br. of App. p. 30–31.

The court did not abuse its discretion by disallowing Defendant to impeach Chell—whose credibility by Defendant's own admission was not a fact of consequence to the action—on a collateral matter.

c. <u>The trial court did not abuse its discretion by ruling the State had not opened the door to highly prejudicial, irrelevant evidence about the victim when the State impeached Defendant about a statement he denied making.</u>

The determination of whether a party has opened the door to inadmissible evidence is reviewed for an abuse of discretion. ***State v.***

***Warren***, 134 Wn. App. 44, 65, 138 P.3d 1081 (2006) (citing ***State v. Bennett***, 42 Wn. App. 125, 127, 708 P.2d 1232 (1985)). The trial court has considerable discretion in administering the open door rule. ***Ang v. Martin***, 118 Wn. App. 553, 562, 76 P.3d 787 (2003). The trial court in the present case did not abuse its discretion by finding the State had not opened the door to highly prejudicial, irrelevant evidence of prior sexual abuse of M.W. when it impeached Defendant on whether he had made a certain statement to officers.

The statement of Defendant that the State sought to impeach was from the cross-examination of Defendant:

> [STATE]: Well, a moment ago, you testified you were pretty adamant this is the only time that you ever touched [M.W.], and now you're saying it's possible that you told Officer Chell that you touched her breast accidentally when you were moving out of the home?
> [DEFENDANT]: I – I didn't tell him that I touched her when we were moving out – out of the home.

10RP 865–66. It was Defendant's denial of making this statement that the State sought to rebut through Chell's testimony. 11RP 892–93. When the State asked Chell if Defendant had offered any explanation, Chell confirmed that Defendant had told him that he inadvertently brushed up against M.W.'s breast while the family was moving. 11RP 901. Chell confirmed that Defendant had made the statement that Defendant denied making on cross-examination.

Before his cross-examination of Officer Chell, Defendant raised the same "open the door" argument he now raises that this limited questioning opened the door to prior sexual abuse of M.W. that the court had repeatedly held was inadmissible. *See* 11RP 902–04.[10] The court rejected the argument:

> [COURT]: Well, the only purpose that this is being allowed for was to – your client testified that the way he ended up accidentally touching this child was a demonstration of a good touch/bad touch or – no, excuse me, where to hit somebody in the event that they are sexually aggressive. And he demonstrated how in doing that, that he accidentally went up the left leg and ended up touching underneath the right breast of this individual.
>
> Well, it's obvious from this officer's testimony that that is in conflict with what he told the officer that night as to how he touched that child . . . .
>
> Now, if he talked about or he was asked about something that occurred in Tennessee or some other explanation that he gave for why this child was doing what she was doing, then I would agree with you.

11RP 905. The court further reiterated, "This is simply in rebuttal to a statement that was made by your client under direct exam, and that's what it's going to be limited to." 11RP 907.

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[10] According to defense counsel, the officer's report included three explanations given by Defendant as to why M.W. was making the accusations: (1) The accidental touching during a demonstration to M.W. and L.C. that Defendant testified to; (2) an accidental touching while moving boxes that Defendant denied making in his testimony, and (3) a prior unrelated incident of sexual abuse involving M.W. The prior sexual abuse was the subject of extensive pre-trial motions and hearings, and the trial court made clear the limits on questions about M.W.'s "sexual history": "certainly, *nothing* about the incident that occurred in Tennesse. . . . I don't find *any connection* to those two incidents." 8RP 309–10 (emphasis added).

Contrary to Defendant's characterization, the State did not "choose to introduce" one of Defendant's explanations when he had in fact offered three. *See* Br. of App. p. 33. Rather, the State offered Chell's testimony to impeach Defendant's *denial* of ever making that particular statement.

A prosecutor is entitled to impeach a defendant's testimony. ***Thompson***, 169 Wn. App. at 485. The State did not ask Chell about all explanations Defendant gave, leaving a partial story that might open the door to inadmissible evidence. The State only inquired whether Defendant had in fact made a statement to Chell about the moving incident that Defendant later denied making. The trial court did not abuse its discretion by finding that the State's limited and direct impeachment of this particular denial of Defendant did not open the door to evidence that M.W. had been previously sexually abused.

4. BECAUSE THERE WAS NO PRESERVED ERROR, THE CUMULATIVE ERROR DOCTRINE IS INAPPLICABLE AND DEFENDANT'S CONVICTIONS SHOULD BE AFFIRMED.

Even if standing alone each error would be considered harmless, cumulative error may warrant reversal. ***State v. Weber***, 159 Wn.2d 252, 279, 149 P.3d 646 (2006) (citing ***State v. Greiff***, 141 Wn.2d 910, 929, 10 P.3d 390 (2000)). Cumulative error, however, does not apply where the errors are few and have little to no effect on the trial's outcome. *Id.* The doctrine is limited to instances where several trial errors combined may

deny a defendant a fair trial. ***Greiff***, 141 Wn.2d at 929 (reversal not required because only two errors that had little or no effect on trial outcome). *Cf.*, ***State v. Badda***, 63 Wn.2d 176, 183, 385 P.2d 859 (1963) (reversal required for three instructional errors and the prosecutor's remarks during voir dire); ***State v. Alexander***, 64 Wn. App. 147, 158, 822 P.2d 1250 (1992) (reversal required for a witness's impermissible comments on the truth of victim's story, the prosecutor's impermissible eliciting of the defendant's identity from the victim's mother, and the prosecutor's repeated attempts to introduce inadmissible testimony during trial and closing).

In the present case, as detailed above, most errors alleged by Defendant were unpreserved for appeal, and those that were preserved were not actually error. Therefore, these alleged errors could not have cumulatively deprived Defendant of a fair trial, and his convictions should be affirmed.

## D. CONCLUSION.

Because Defendant failed to object to prior consistent statements made by M.W., therefore he has waived that issue for appeal.

The prosecutor did not commit flagrant and ill-intentioned misconduct because he did not ask improper "liar questions;" rather, he

laid the foundation for impeachment by contradiction. Defendant also cannot show the requisite prejudice because the witnesses did not actually comment on the veracity of other witnesses and defense counsel employed that style of questioning first.

Further, the prosecutor did not commit flagrant and ill-intentioned misconduct by improperly appealing to the passions of the jury when he emphasized contradictions in Defendant's testimony and directly responded to Defendant's closing argument. Defendant also cannot show the requisite prejudice because the jury was properly instructed on its role.

Defendant did not object to the impeachment evidence offered via Officer Chell's testimony, and therefore waived that issue for appeal. The trial court did not abuse its discretion by limiting Defendant's impeachment of Chell to that which was of consequence to the action. The trial court further did not abuse its discretion when it found the limited and direct impeachment of Defendant via Chell's testimony did not open the door to the irrelevant prior sexual abuse of M.W.

Finally, because Defendant has presented no actual errors on appeal, he was not denied a fair trial under the cumulative error doctrine.

For the foregoing reasons, the State respectfully requests that this court affirm defendant's convictions of four counts of second degree child rape.

DATED: October 1, 2015.

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Pierce County
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Rule 9 Legal Intern

Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

10-1-15
Date Signature

# PIERCE COUNTY PROSECUTOR

## October 01, 2015 - 3:45 PM

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